(11)

No. 95-1608

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

LOU MCKENNA, Director, Ramsey County Department of Property Records and Revenue; and JOAN ANDERSON GROWE, Secretary of the State of Minnesota,
Petitioners,

v.

TWIN CITIES AREA NEW PARTY,
Respondent.

On Writ of Certiorari
To The United States Court of Appeals
For the Eighth Circuit

BRIEF *AMICI CURIAE* OF TWELVE UNIVERSITY PROFESSORS AND CENTER FOR A NEW DEMOCRACY IN SUPPORT OF RESPONDENT TWIN CITIES AREA NEW PARTY

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STATEMENT OF INTEREST

Amici are twelve university professors who have an interest in this matter as students and teachers of the history and dynamics of the American political system; and the Center for a New Democracy, a Washington, D.C.-based non-profit organization that provides support services to grassroots efforts to reform campaign laws. *Amici* submit this brief in support of the respondent, the Twin Cities Area New Party, and urge this Court to affirm the Eighth Circuit's judgment that Minnesota's law banning electoral "fusion," or multiparty nomination, places a constitutionally impermissible burden on the rights of minor political parties.

The individual writings of *amici* professors have been cited by each side to this dispute, *see* Petitioners' Br. at 27; Respondent's Br., and by the Court of Appeals below, Cert. Pet. App. 4. *Amici* seek to assist the Court, as it decides this important case concerning the rights of political parties and voters, by explaining the history of fusion and anti-fusion laws. The professors joining this brief are:

- Peter Argersinger, Presidential Research Professor of History, University of Maryland, Baltimore County;
- Dale Baum, Associate Professor of History, Texas A&M University;
- Walter Dean Burnham, Frank C. Erwin Junior Centennial Chair, Professor of Government, University of Texas;
- Colin Gordon, Associate Professor of History, University of Iowa;
- Ira Katznelson, Ruggles Professor of Political Science, Columbia University;
- Michael Kazin, Professor of History, American University;
- Paul Kleppner, Distinguished Research Professor of History and Political Science, Northern Illinois University;
- J. Morgan Kousser, Professor of History and Social Science, California Institute of Technology;

- Theodore Lowi, John L. Senior Professor of American Institutions, Cornell University;
- Jeffrey Ostler, Assistant Professor of History, University of Oregon;
- Daniel Mazmanian, Director of the Center for Politics and Economics, Luther J. Lee Professor of Government, Claremont Graduate School; and
- Richard Valelly, Professor of History, Swarthmore College.

SUMMARY OF ARGUMENT

In evaluating constitutional challenges to state election laws, this Court has weighed the nature and magnitude of the asserted injury to the plaintiff's rights, the interests identified by the state, and "the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *Burdick v. Takushi*, 504 U.S. 428, 435 (1992). The research and expertise of *amici* professors bear specifically on three issues relevant to the Court's inquiry in this case: (1) the motives behind state anti-fusion laws; (2) the electoral consequences of those laws, including the injury to minor parties like the Twin Cities Area New Party; and (3) the validity of the asserted state interests in maintaining those laws today.

As to each issue, the historical record is unequivocal. State legislatures passed anti-fusion laws in the late nineteenth and early twentieth century on strictly partisan grounds and with clear animus toward the political participation of minor parties and their supporters. In the short term, state anti-fusion laws undermined the political influence of prominent minor parties; in the longer term, anti-fusion laws, in concert with other changes in electoral laws, not only threatened the viability of minor political parties but also contributed to the slow collapse of the high voter turnout and issue-driven electoral competition that marked late nineteenth century American politics. Finally, the historical evidence is

completely at odds with the State's claim that electoral fusion would invite harmful political instability and voter confusion. Indeed, there is ample evidence -- in the experience of both those states which have banned fusion and in those which have maintained the practice -- that the fusion option yields more meaningful political competition and a better-informed electorate.

ARGUMENT

I. LAWS BANNING FUSION CANDIDACIES WERE PURELY PARTISAN EFFORTS TO STRENGTHEN DOMINANT PARTIES AND DESTROY MINOR PARTIES

In Part III, *infra*, *amici* argue that the historical record renders invalid the State's proffered interests in its anti-fusion law. The reason for the poor fit between the law and these state interests is illuminated in this Part, in which we provide evidence that the actual motivations for anti-fusion laws had little, if anything, to do with any legitimate interest now identified by the state. Instead, these laws were propelled by the desire of ruling political parties to squelch the aspirations of budding political parties and their supporters. Such self-serving and anti-democratic purposes call into question the legitimacy of anti-fusion laws. *Cf. Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788, 812-13 (1985) (remanding First Amendment challenge to exclusion of advocacy group from federal charity drive to consider whether the exclusion was "impermissibly motivated by a desire to suppress a particular point of view"); *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936) (striking down challenged state tax as violative of First Amendment because it appeared aimed at reducing circulation of newspapers that were critical of the state government).

Electoral fusion was a staple of late nineteenth century politics in the United States. It was practiced most commonly

in the Midwest and West as a means of forging electoral alliances between various minor parties and the Democratic Party, which was then the weaker of the two major parties in these regions. Multiple party nomination "helped to maintain a significant third party tradition by guaranteeing that dissenters' votes could be more than symbolic protest, that their leaders could gain office, and that their demands might be heard." P. Argersinger, *"A Place on the Ballot": Fusion Politics and Antifusion Laws*, 85 American Historical Review, 287, 288-289 (1980). In the intensely partisan electoral atmosphere of the late nineteenth century, minor parties represented a "critically important proportion of the electorate," and the fusion option became a mechanism for providing representation for this significant bloc of voters. *Id.*, at 289.

In the West and Midwest of the late nineteenth century, as in fusion's most important modern foothold, New York State, fusion enhanced political participation by allowing minor parties to maintain bailot status, enabling minor party supporters to escape the "wasted vote" dilemma of winner-take-all elections, and giving voters the opportunity of supporting a major party's candidate without supporting the candidate's party. *See* H. Scarrow, *Parties, Elections, and Representation in the State of New York* 56 (1983); D. Mazmanian, *Third Parties in Presidential Elections* 115-135 (1974); Argersinger, *A Place*, at 303-306.

A. Anti-Fusion Laws Were Part of a Package of "Reforms" Aimed at Weakening Opponents of a State's Governing Party

Anti-fusion laws were a key component of a general "reform" movement of the late nineteenth and early twentieth century, a movement aimed at weakening the opposition to dominant political forces. The suffrage and ballot access restrictions in the post-Civil War South were simply the most egregious example of a national pattern in which the pursuit

of "good government" often masked concerted efforts to constrain politics along racial, class, and partisan lines. *See* Hays, *The Politics of Reform in Municipal Governments in the Progressive Era*, 55 Pacific Northwest Quarterly 157-169 (1965); M. Kousser, *The Shaping of Southern Politics: Suffrage Restrictions and the Establishment of the One-Party South, 1880-1910*, 250-265 (1974); F.F. Piven & R. Cloward, *Why Americans Don't Vote* 85-95 (1988).

Legislative prohibition of fusion accompanied a wide array of "reforms" designed in large measure to ensconce the ruling party. These provisions ranged from periodic voter registration requirements, runoff primaries in the South, and institution of the Australian ballot (uniform state-printed ballots that replaced the ballots traditionally distributed by political parties), to more obvious efforts to restrict voting such as literacy tests, poll taxes and residency requirements. All of these developments had the effect -- and often the intent -- of disenfranchising voters of ordinary means, handicapping opposition parties, quelling dissent, and narrowing partisan competition.

While the scope and variety of these restrictions make it difficult to isolate the consequences of any single innovation, placing anti-fusion laws in this context does underscore the broader motives and goals of their sponsors. Throughout the Midwest, for example, Republican legislators abused the introduction of the Australian ballot to constrain ballot access. While state responsibility for printing ballots enhanced the integrity of the election process, there was a darker side: Those in power were able to juggle the form of the ballot in such a way as to bar multiple endorsements -- "a scheme," as one Nebraska judge noted, "to put voters in a straightjacket." Argersinger, *A Place*, at 292. Thus in Minnesota, a Republican Secretary of State used the introduction of the Australian ballot in 1892 to block the fusion option, deciding, although the new ballot rules were silent on the question, that candidates' names could appear only once. Democratic fears that this restriction would cost them upwards of 20,000 votes

proved accurate. The next election was dominated by the Republicans. *Id.* at 295. This dominance was entrenched by the enactment of an explicit ban on fusion in 1901.

B. The Partisan Motives Behind Anti-Fusion Laws Were Obvious

Examination of the intent behind state anti-fusion laws not only illuminates the motives of historical actors, but also compels careful scrutiny of the interests of states like Minnesota in maintaining these laws. The historical record shows that changes such as anti-fusion laws were partisan measures aimed squarely at destroying the political aspirations of minor parties. Which major party led the charge in each region depended on which party in that region was dominant and thus able to enact barriers to the success of political competitors. "Government officials are not only agents of the state, but also partisan politicians. Democrats and Republicans have been able to use the authority of the state indirectly to handicap if not eliminate the opposition." Mazmanian, *supra*, at 90.

In the Democrat-dominated South, state legislatures systematically erected suffrage and ballot access restrictions after 1890. The intent and consequences of these restrictions were both to disenfranchise African-Americans and, just as importantly, to solidify one-party rule against inroads by Republicans or Populists. *See* Kousser, *supra,* at 5-9 & *passim.*

In the Republican-dominated northern United States, especially the Midwest, legislators used anti-fusion statutes to solidify their control of statehouses and electoral votes. "The Republicans' partisan motivation was transparent and repeatedly, if inadvertently, confessed." Argersinger, *To Disenfranchise the People: The Iowa Ballot Law and the Election of 1897*, 63 Mid-America 18, 22 (1981). In this region of the country, anti-fusion laws were passed along nearly perfect partisan lines -- supported by Republicans,

opposed by Democrats and others -- and they spread as the Republicans captured statehouses after 1890. In state after state, efforts to manipulate ballot laws to prevent electoral fusion were "intended to promote the dissolution of party ties while giving Republicans the residual benefits of them." Argersinger, *A Place*, at 292. As a Michigan Republican admitted: "We don't propose to allow the Democrats to make allies of the Populists, Prohibitionists or any other party, and get up combination tickets against us. We can whip them single-handed, but don't intend to fight all creation." *Id.* at 296. In Iowa, the Republicans feared that their partisan motives were so obvious as to spark an electoral backlash, and one Populist wondered bitterly why the ban "did not go on a little further and say there shall be but one ticket allowed on the ballot and that must be the Republican ticket." Argersinger, *To Disenfranchise the People*, at 23.

II. FUSION BANS HAVE HELPED DESTROY MINOR PARTIES AND REDUCE VOTER PARTICIPATION

Anti-fusion laws clearly played an important role in the creation of the electoral "system of 1896," the name given by Schattschneider, *The Semisovereign People* 78-85 (1960), to the pattern of electoral politics ushered in by the defeat of the Populist Party in the 1896 elections. This system was marked by a sharp decline in partisan competition and identification; the strengthening of regional party monopolies (Democrats in the South, Republicans in the North); increases in institutional barriers to minority party competition; and the beginning of a steady downturn in voter turnout.

Amici do not claim that anti-fusion laws were the only or even the primary force behind the "system of 1896." It is difficult, in assessing either short- or long-term consequences, to isolate anti-fusion laws from the larger bundle of restrictions on suffrage and ballot access, most of which were enacted at very nearly the same time, some of which (poll

taxes, literacy tests, onerous residency requirements) are no longer on the books, and some of which (the Australian ballot, personal registration requirements, runoff elections) persist. And it is difficult to attribute national trends (such as barriers to third parties and declining turnout) to a legislative pattern which varied considerably from state to state and region to region.

However, weighing all of the historical evidence, *amici* believe that fusion bans were critically important in many states and, overall, no less important than other similar means to the same end. As noted above, the institution of the Australian ballot gave those in power the opportunity and mechanism by which to introduce fusion bans. This mechanism, together with express anti-fusion laws, magnified the effect of "first-past-the-post" or winner-take-all elections by erasing any electoral rewards for minor party activity.

While scholars may disagree over the causal importance of various aspects of the "system of 1896," most agree that institutional "reforms," the collapse of party competition, the entrenchment of an oligarchic two-party system, and the decline in voter turnout were mutually reinforcing -- and mutually destructive. *See, e.g.*, Burnham, "The System of 1896: An Analysis," in P. Kleppner, ed., *The Evolution of American Electoral Systems* 152-165 (1981). People ceased to vote as their electoral options narrowed or lost meaning. "Mobilization of the mass electorate has always been, and still remains, contingent on the existence and vitality of political parties." P. Kleppner, *Who Voted? The Dynamics of Electoral Turnout, 1870-1980* 27 (1982). Thus, while anti-fusion laws undermined the *existence* of minor parties -- which found ballot access much harder to maintain -- they also undermined the *vitality* of major parties, which faced less competition and increasingly stood for nothing but election. *Id.* at 56-57.

A. Fusion Has Proved Necessary to the Endurance of Minor Parties

In assessing the impact of anti-fusion laws on the fate of minor parties, we can offer two types of evidence: (1) the rapid demise of the Populist Party in the wake of the late nineteenth century fusion bans; and (2) the relative success of minor parties in electoral settings where fusion was not banned, as in New York. Indeed, two extensive studies of the third party experience conclude that ballot access restrictions such as fusion bans have devastated minor parties by magnifying the winner-take-all logic of American politics, and that the fusion option is integral to the viability and success of minor parties. Mazmanian, *supra*, at 119; S. Rosenstone, et al., *Third Parties in America: Citizen Response to Major Party Failure* 16-25 (1984).

Suffrage restrictions wiped out the Populist Party, which had emerged in 1891 and acquired strong labor and farmer support with its commitment to a tax on income, public ownership of utilities, and free coinage of gold and silver. In every setting in which the Populists threatened success, the party in power (Democrats in the South, Republicans in the Midwest) moved to narrow the electorate and erect barriers to effective opposition. In the election of 1896, William Jennings Bryan, the Populist-Democratic Presidential candidate, stumbled badly in anti-fusion states and did well where the practice was still legal and common. Indeed, the election was so instructive that Republican legislatures hurriedly passed anti-fusion laws in Illinois, Indiana, Iowa, North Dakota, Pennsylvania, Wisconsin, and Wyoming in 1897; in California and Nebraska in 1899; in Kansas, Minnesota, and South Dakota in 1901; in Idaho in 1903; and in Montana in 1907. Argersinger, *A Place*, at 301-02.

Invariably, the fusion ban forced Populist leaders and voters to choose between the quixotic protest represented by the separate Populist ballot line and uncomfortable support of

a major party candidate. In Iowa (and elsewhere) the latter choice cost the Populist Party its ballot access in the first election after the ban was passed. Argersinger, *To Disenfranchise the People*, at 32-33. The anti-fusion law "practically disenfranchises every citizen who does not happen to be a member of the party in power," lamented one Populist. ". . . They are thus compelled to lose their vote (as that expression is usually understood) or else unite in one organization. It could mean that there could only be two parties at one time." Argersinger, *A Place*, at 304.

While fusion bans destroyed minor parties in the late nineteenth century, the absence of such prohibitions -- most importantly in New York State -- has enabled minor parties to thrive. In New York, a strong and stable tradition of multiple party nomination, on separate ballot lines, has sustained four important minor parties: the American Labor Party, the Conservative Party, the Liberal Party, and the Right to Life Party. By offering or withdrawing their support of major party candidates, these parties, which now claim over 20 percent of New York's registered voters, have not only wielded important and often decisive power but have contributed to a diverse and competitive political culture.

As the New York experience indicates, the fusion option is essential to the long-term survival of minor parties in the United States. It is the means by which minor parties can escape the dismal choice between wasting their supporters' votes and disappearing into one of the two major parties. Mazmanian, *supra*, at 117-124; Kirschner, Note, *Fusion and the Associational Rights of Minor Parties*, 95 Columbia Law Review 683, 684, 702 (1995); Scarrow, *supra*, at 56.

While third parties have occasionally cropped up outside of New York State, they have not shown great durability or stability. Minor party successes in anti-fusion jurisdictions have been either exceptional responses to exceptional circumstances, or ephemeral, candidate-centered national campaigns. The success of Minnesota's Farmer-Labor Party through the inter-war years, followed by the party's 1944

merger with the state Democratic Party, suggests that while anti-fusion laws are not an absolute barrier to successful third-party politics, their central tendency is to preclude third parties as durable and effective independent associations. R. Valelly, *Radicalism in the States: The Minnesota Farmer-Labor Party and the American Political Economy* (1989); Mazmanian, *supra*, at 27, 120; Penniman, "Presidential Third Parties and the Modern American Two-Party System," in W. Crotty, ed., *The Party Symbol* 101-117 (1980).

B. Fusion Bans Have Correlated With Lower Voter Turnout

The first and foremost casualty of a less competitive political system was voter turnout. "The coalitional arrangements created by the 'System of 1896,' eroded the older linkages among group subcultures, partisan identification, and turnout rates.... [T]hat displacement resulted in a steep drop in the rate at which newly eligible voters were inducted into the active electorate, and a corresponding level of decay in the general turnout." Kleppner, *supra*, at 53. From historic highs of nearly 80 percent in the 1880s, voter turnout has plummeted to barely 50 percent in presidential elections, with almost half of that decline concentrated in the first decade after 1896. The "drop-off" in off-year elections has risen even more sharply: In the 1880s almost 65 percent voted in such contests, but by the 1980s barely 30 percent turned out. *See* Burnham, *The Changing Shape of the American Political Universe*, 59 American Political Science Review, 7, 10 (1965); Kleppner, *supra*, 112, 113; R. Scammon & A. McGillivray, eds., *America Votes* 1, 13 (1995). Again, it is not easy to unravel the specific causal effect of anti-fusion statutes in assessing national or long-term trends. But the evidence that fusion bans contribute to a decline in voter turnout, both in the wake of the Midwestern fusion bans and in a fusion setting such as New York, is compelling.

As fusion bans forced Midwestern Populists to choose between the Democrats and Republicans, many simply avoided the polling place entirely. This response was exacerbated by the fierce partisan loyalties of the late nineteenth century, the widespread association of Republicans with banking and railroad trusts, and the persistent association of the Democratic Party with the "bloody shirt" of the Civil War. In the aftermath of their state's fusion ban, "a sizable minority" of Kansas Populists dropped out of the electorate. Argersinger, *A Place*, at 303. South Dakota witnessed "a huge increase" in non-voters after its fusion ban. *Id.* Many Iowa Populists, left "confused and discouraged" by a fusion ban, either spoiled their newly-restrictive ballots (in protest or in error) or simply declined to vote. *See* Argersinger, *To Disenfranchise the People*, at 32-33.

By contrast, states which continued to allow fusion boasted relatively healthy levels of party competition and voter turnout. Again New York State, the setting in which fusion has been widely practiced, offers a striking example. New York has historically been the most competitive electoral arena in the country, measured by the vote margin between the winning candidate and the nearest opponent. *See* P. David, *Party Strength in the United States* (1972). And New York has historically outpaced national rates of voter turnout. *See* Scarrow, *supra*, at Appendix II, 94-95.[1]

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[1] While New York State's politics have remained uniquely competitive since 1970, turnout has slipped to echo the national average. This trend reflects both the dramatic national collapse in voter turnout (which fell from the 60-65 percent range in the 1960s to barely 50 percent by the end of the 1970s) and public despair over New York's pervasive fiscal crisis. Despite the decline in turnout, minor parties have retained their critical importance: In the most recent statewide election, in 1994, George Pataki won the gubernatorial race with a plurality of 174,000 votes while counting 329,000 votes on the ballot line of the Conservative Party and another 54,000 votes as the "Tax Cut Now" candidate. *See* Scammon & McGillivray, *supra*, at 13, 323, 332.

III. THE INTERESTS IDENTIFIED BY THE STATE ARE NOT CONSISTENT WITH HISTORICAL EXPERIENCE OR CORE PRINCIPLES OF OUR POLITICAL SYSTEM

Finally, *amici* consider the interests cited by the State in support of maintaining its fusion ban. The State argues that such bans are needed to protect the stability of the electoral system and to protect voters from confusion. As discussed in Part I, *supra*, these claims are not supported by the historical evidence. Such motives had little to do with the passage of anti-fusion laws, which were narrowly partisan tactics aimed at disabling minor parties and disenfranchising their supporters. Not surprisingly, expressed concern for "political stability" crops up in the historical record as well, but political historians now widely recognize such sentiments as a smoke screen for partisan politics and a mistrust of working class voters, especially African-Americans in the South and recent immigrants in the urban North. *See* Hays, *supra* at 157-169; Kousser, *supra*, at 250-265; Piven & Cloward, *supra*, at 85-95. *Cf. Wallace v. Jaffree*, 472 U.S. 38, 64 (1985) (Powell, J., concurring) (in the Establishment Clause context, "a law will not pass constitutional muster if the ... purpose articulated by the legislature is merely a 'sham'").

A. The "Political Stability" Theory Touted By the State Overstates Greatly the Risks and Ignores the Benefits of Wider Electoral Competition

The State's view of what a "stable" political system should look like -- a two party system in which alliances and compromises are struck within the major parties -- is questioned by many political scientists and political historians. In a nation as vast and diverse as the United States, two parties cannot pretend to consistently represent the interests of the public. In part as a way of avoiding this programmatic

challenge, American politics has evolved around interests rather than ideas, the patronage-fueled party politics of the nineteenth century giving way to the service-oriented "interest-group liberalism" of the modern era. Sustained programmatic competition has rarely been necessary. Disenfranchisement narrowed the focus of both parties, and national two-party competition not only discouraged third parties but also disguised a pattern of essentially non-competitive one-party rule in local and regional politics.

In a two-parties-only system, both parties crowd to the political center. Where the political climate is characterized by hurdles to registration and ballot access, the systematic influence of powerful economic interests, and mass abstention by people of ordinary means, the parties are even less willing to offer distinct programmatic choices, let alone mobilize voters around those choices. *See* E.E. Schattschneider, *Party Government* 65-98 (1942).

Thus, a two-party system that actively hinders minor parties tends to discourage meaningful electoral competition between issue-oriented political parties. The vitality of political competition in the late nineteenth century nurtured high levels of voter interest and turnout, just as the collapse of such competition, reflecting fusion bans and other reforms, caused turnout and interest to plummet after 1896. Burnham, *The Changing Shape*, at 7-28. We cannot argue too strongly the importance of sustaining healthy electoral competition, and the importance of minor parties in breaking the programmatic deadlock of two-party politics. The fusion option is crucial in this respect. Fusion, as both the nineteenth century and New York experiences underscore, forces major parties to take programmatic stands, widens the options available to voters, and encourages competition among parties rather than merely within them. *See* Kirschner, *supra*, at 711.

Furthermore, the State's fears of factionalism and minority rule are misplaced. Indeed, it is not fusion but *bans on fusion* that often encourage factionalism, as minor parties -

- without prospect of electoral rewards -- become mere protest vehicles. Kirschner, *supra*, at 706; Mazmanian, *supra*, at 68-69. Nor does fusion upset the essential majoritarian and winner-take-all character of United States politics. In a system permitting fusion, a *candidate* must still assemble a majority or plurality of voters in order to win, even if the *parties* nominating the candidate do not.

Indeed, the few historical instances under which fusion *has* threatened electoral stability merely suggest the importance of establishing some basic ground rules. Prohibiting the fusion of two major parties would avoid, for example, the anti-partisan implications of California's 1911-1954 major party cross-filing system. *See* Pitchell, *The Electoral System and Voting Behavior: The Case of California's Cross-Filing*, 12 Western Political Quarterly 459, 462-64 (1959); Mazmanian, *supra*, at 133. And requiring consent of the candidate and simple ballot thresholds, as the New York experience demonstrates, avoids the complications of involuntary fusion, as sometimes occurred prior to the institution of the Australian ballot, or "laundry list" ballot lines. Note, *Fusion Candidacies, Disaggregation, and Freedom of Association*, 109 Harvard Law Review 1302, 1331-1333 (1996); Mazmanian, *supra*, at 118; Scarrow, *supra*, at 56-57; Argersinger, *A Place*, at 290.

"[A] review of the [fusion] experience suggests that its practice almost certainly helps to promote rather than undermine democratic stability, not least by providing the public with confidence that the electoral system was not being deliberately rigged against major dissenting streams of public sentiment." Declaration of Walter Dean Burnham, para. 13, Joint Appendix 17. *Amici* strongly agree with the Eighth Circuit that "rather than jeopardizing the integrity of the election system, consensual multiple party nomination may invigorate it by fostering more competition, participation, and representation in American politics." Cert. Pet. App. 7.

B. The Historical Record Undermines the State's Claim That Fusion Causes "Voter Confusion"

There is also no evidence, in either the historical experience of nineteenth century fusion or the contemporary experience of fusion states like New York, that the practice confuses voters. *See* Burnham Declaration, para. 13, Joint Appendix at 17. Indeed, the ephemeral nature of minor parties in an anti-fusion atmosphere is far more likely to confuse the electorate. Where fusion is allowed, minor party presence stabilizes and clarifies electoral competition; third parties are not confined to fleeting, divisive issues or candidate-centered politics. Mazmanian, *supra*, at 120, 152.

Consider the experience of Midwestern states before the fusion bans of the 1890s. It was the peculiarly partisan manipulation of the new Australian ballot which bewildered voters, as Republicans used the new ballot form to render a familiar practice confusing and difficult. Argersinger, *A Place*, at 297-298. With the introduction of new ballot forms and restrictions, voters -- and especially Populist voters -- were left "confused and discouraged" by their narrowed electoral options. Argersinger, *To Disenfranchise the People*, at 32-33.

Compare that result with the modern experience of New York State. As we argue above, the New York system protects the identity of political parties, encourages them to make programmatic appeals to voters, and enables voters to make clear and meaningful choices between candidates and between parties. Scarrow, *supra*, at 9-18. Fiorello La Guardia, who ran on no less than nine different party lines in his political career, maintained a distinct political identity. His mayoral victory in New York City in 1932 was an explicit and widely appreciated effort to unite "regular Republicans, dissident Democrats, and Independent Socialists" against the corruption of the notorious "Tammany Hall" machine. "La Guardia entered City Hall at the head of a coalition comprising disparate elements," notes one political scientist. "Yet there could be no mistaking what was essential in his

mandate." A. Mann, *La Guardia Comes to Power, 1933* 124, 153 (1965). *See also* T. Kessner, *Fiorello La Guardia and the Making of Modern New York* 239-253 (1989). Again, we agree with the Eighth Circuit that fusion "informs voters rather than misleads them," and we share that court's doubts about the State's contention, as that court characterized it, that "multiple party nomination would confuse voters by giving them more information." Cert. Pet. App. 8-9.

CONCLUSION

The weight of scholarly evidence regarding the history of electoral fusion supports the contention of the Twin Cities Area New Party that a ban on fusion imposes heavy burdens on that party's rights, that the interests put forward by the State are unwarranted and invalid, and that those interests provide no basis for abridging the essential rights urged by the New Party. Anti-fusion laws were passed with partisan intent and a candid animus towards minor parties. The passage of these laws has contributed directly and indirectly to the decline in electoral competition and voter turnout which has marked electoral politics since 1896. Neither the experience of anti-fusion states before the 1890s, nor the experience of fusion states since the 1890s, justify the State's fears of political instability or voter confusion. Accordingly, this Court should affirm the judgment of the Eighth Circuit.

Respectfully submitted,

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